

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SIGNAL HOUND, INC.,

Plaintiff,

v.

EXPANDABLE SOFTWARE, INC.,

Defendant.

CASE NO. C21-5448 BHS

ORDER

This matter comes before the Court on Defendant Expandable Software, Inc.’s Motion to Dismiss, Dkt. 17. The Court has considered the briefing filed in support of and in opposition to the motion and the remainder of the file and grants in part and denies in part the motion for the reasons stated below.

**I. BACKGROUND**

Plaintiff Signal Hound, Inc. is a global corporation in Battle Ground, Washington that designs and builds spectrum analyzers and signal generators for engineers and radio frequency professionals. Dkt. 14, ¶ 5. In 2019, Signal Hound was looking to upgrade its Enterprise Resource Planning (“ERP”) software, which it uses to do things such as calculate pricing discounts. *Id.* ¶¶ 6–7. Signal Hound sent a Request for Information

1 (“RFI”), Dkt. 14-1, to software companies to determine their respective capabilities and  
2 to create a short list of vendors who would be asked to provide full proposals. Dkt. 14,  
3 ¶ 7. Expandable responded to the RFI and was ultimately selected to provide a full  
4 proposal. *Id.* ¶¶ 8–13; *see also* Dkt. 14-1.

5 Signal Hound’s RFI informed vendors that it sought an integrated system that  
6 could accomplish the same tasks of the multiple software programs it was then using.  
7 Dkt. 14-1 at 4. It wanted to increase efficiency and accuracy by limiting manual  
8 manipulation and data entry. *Id.* The first part of the RFI prompted respondents to  
9 indicate whether they could support certain programs. *Id.* at 6. Respondents could also  
10 write comments about the requirements and were prompted to respond to other open-  
11 ended questions in the second part of the RFI. *See id.* at 7–18.

12 Expandable responded that most of Signal Hound’s requirements were supported  
13 “out of the box.” *See id.* at 7–13. Among the things Expandable said were supported out  
14 of the box was the requirement labeled “Price Lists Defined with Multiple Criteria;  
15 Matrix Based Pricing for Volume Buying; Contract Specific Pricing Capabilities;  
16 Promotional Codes for Marketing Purposes.” *Id.* at 11. Expandable also stated that  
17 “[s]oftware customization is rarely needed because Expandable ERP software is  
18 extensively configurable” and that “workflow can be tailored to match the unique  
19 business processes of [the] organization.” *Id.* at 14. It also represented that its customers  
20 receive “a full-blown, proven ERP system that is easy to use, well-supported and will  
21 meet their needs far into the future.” *Id.* at 15.  
22

1       The companies met at Signal Hound’s office in Battle Ground to discuss Signal  
2 Hound’s requirements and Expandable’s capabilities. Dkt. 14, ¶¶ 13–14. During those  
3 meetings, Expandable indicated that it “could not currently handle Signal Hound’s  
4 current pricing model, because it was based on the quantity of items purchased rather  
5 than the dollar volume of the purchase.” *Id.* ¶ 14. Signal Hound’s CEO responded that he  
6 would work on developing a dollar-volume pricing model, which Expandable assured  
7 him they could work with. *Id.* Expandable’s executives assured Signal Hound that if  
8 Expandable “could not make its software work to Signal Hound’s satisfaction,” it would  
9 fully refund the purchase price as it had done for another customer. *Id.* ¶ 16.

10       Expandable then sent Signal Hound a quote totaling \$158,709 which included the  
11 “Expandable ERP Software Base Module” for \$95,500, third-party products for \$7,590,  
12 the “Expandable Implementation, Training & Professional Services” for \$50,170 based  
13 on an estimated 286 hours of professional services, annual maintenance for \$20,499, and  
14 a \$15,050 discount. *Id.* ¶ 18; *see also* Dkt. 14-2 at 2–3. Signal Hound accepted that offer  
15 and signed the Software Licensing Agreement (“SLA”) and the Software Maintenance  
16 Agreement (“SMA”) on November 26, 2019. *See* Dkt. 14-2 at 4–10. The SLA contained  
17 a warranty waiver stating “[t]his warranty is in lieu of all other warranties expressed or  
18 implied, including, but not limited to, the implied warranties of merchantability and  
19 fitness for a particular purpose.” Dkt. 14-2 at 4. Both the SLA and SMA included choice  
20 of law provisions stating: “This agreement will be governed by the laws of the State of  
21 California” and a provision stating: “This agreement . . . is the complete and exclusive  
22 statement of the agreement between the parties, and supersedes all proposals or prior

1 | agreements, oral or written, and all other communications between the parties relating to  
2 | the subject matter of the agreement.” *Id.* at 5, 9. (emphasis omitted). Signal Hound paid  
3 | all amounts due under the contracts. Dkt. 14, ¶ 21.

4 |       Expandable and Signal Hound tried for months to implement the software. *Id.*  
5 | ¶ 22. Ultimately, Expandable was unable to provide automated pricing based on Signal  
6 | Hound’s new pricing model. *Id.* Expandable offered to customize the software to handle  
7 | the pricing model, apprising Signal Hound that the customization would cost over  
8 | \$200,000 and take more than a year to implement. *Id.* ¶ 23. Signal Hound rejected that  
9 | offer and Expandable’s alternative solution to continue to run the software Signal Hound  
10 | had previously used, Microsoft Access, alongside Expandable’s software. *Id.* ¶¶ 23–24.  
11 | Signal Hound requested a refund which Expandable rejected. *Id.* ¶ 24. Signal Hound  
12 | never finished implementing Expandable’s software. *Id.*

13 |       Signal Hound sued Expandable for intentional misrepresentation, negligent  
14 | misrepresentation, breach of implied warranty of fitness for particular purpose, breach of  
15 | implied covenant of good faith and fair dealing, and failure of consideration. Dkt. 14.  
16 | Expandable moves to dismiss for failure to state a claim, arguing that Signal Hound did  
17 | not plead its misrepresentation claims with the particularity required for fraud claims,  
18 | Signal Hound is attempting to add new contract terms, and the contract waived implied  
19 | warranties. Dkt. 17. Signal Hound argues that it effectively pled its misrepresentation  
20 | claims with particularity, the warranty waiver in the contract was not conspicuous, and  
21 | Expandable’s failure to provide usable software prevented the purpose of the contract  
22 | from being realized and made the contract fail in a material respect. Dkt. 20.

## II. DISCUSSION

### A. Legal Standard

Dismissal under Federal Rule of Civil Procedure 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff's complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the Court must accept as true the complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion to dismiss. *Vazquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnotes omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me-allegation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555.).

**B. Misrepresentation Claims**

The Software License Agreement provides that it “will be governed by the laws of the State of California.” Dkt. 14-2 at 9. Courts generally enforce choice of law provisions. *See McKee v. AT&T Corp.*, 164 Wn.2d 372, 384 (2008). Neither party disputes the applicability of the choice of law provision or of California law, but the choice of law provision, on its face, applies only to the contract. Therefore, the provision applies to Signal Hound’s contractual claims (breach of implied covenant of good faith and fair dealing, breach of implied warranty of fitness for a particular purpose, and failure of consideration). But it does not seem to apply to Signal Hound’s tort claims (intentional misrepresentation and negligent misrepresentation).

The Court only performs a choice of law analysis if there is an actual conflict between the laws of the two relevant jurisdictions. If an actual conflict exists, Washington courts apply the law of the jurisdiction with the “most significant relationship” to the dispute, including considering any choice of law agreement between the parties. “When parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis.” *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692 (2007) (internal quotations omitted). A “real conflict” exists if the result for a particular issue is different under the two states’ laws. *Id.*

There does not appear to be a real conflict between California and Washington law for Signal Hound’s intentional or negligent misrepresentation claims, and thus the Court believes it is appropriate to apply Washington law to those claims. Nevertheless, the

1 parties have not had a chance to brief the applicability of Washington law to those claims  
2 or the viability of those claims under Washington law. Therefore, the Court RESERVES  
3 RULING on Expandable's motion to dismiss Signal Hound's misrepresentation claims  
4 and will rule on those claims after the parties have had an opportunity to brief the issues.

5 **C. Breach of Implied Covenant of Good Faith and Fair Dealing**

6 Signal Hound alleges that Expandable breached the implied covenant of good faith  
7 and fair dealing by refusing to customize its software to accommodate Signal Hound's  
8 pricing model at a reasonable price and in a reasonable time frame. Dkt. 14, ¶ 41.

9 Expandable argues that Signal Hound is asking the Court to add a new requirement to the  
10 contracts because under the express terms of the contracts, Expandable was not required  
11 to customize its software to comport with Signal Hound's complicated pricing model.  
12 Dkt. 17 at 15–16. Signal Hound argues that there are potentially other terms of the  
13 contract not explicitly mentioned and that, if Expandable could accomplish the necessary  
14 customization in a reasonable time frame and for a reasonable cost, it was required to  
15 offer that solution to Signal Hound. Dkt. 20 at 19.

16 The covenant of good faith and fair dealing “not only imposes upon each  
17 contracting party the duty to refrain from doing anything which would render  
18 performance of the contract impossible by any act of his own, but also the duty to do  
19 everything that the contract presupposes that he will do to accomplish its purpose.”  
20 *Pasadena Live v. City of Pasadena*, 114 Cal. App. 4th 1089, 1093 (2004) (internal  
21 quotation omitted). The covenant “is limited to assuring compliance with the *express*  
22 *terms* of the contract, and cannot be extended to create obligations not contemplated by

1 the contract.” *Id.* at 1094 (internal quotation omitted) (emphasis in original). Breach of  
2 the contract “is not a necessary prerequisite” to a claim for breach of the implied  
3 covenant of good faith and fair dealing. *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal.,*  
4 *Inc.*, 2 Cal. 4th 342, 373 (1992).

5       Signal Hound has not stated a plausible good faith and fair dealing claim. While  
6 Expandable may have made representations that it could accommodate certain pricing  
7 models prior to executing the contract, the parties signed a contract without such  
8 representations or requirements. Expandable did not have a contractual duty to alter its  
9 software at a discounted cost or in a short time frame, and Signal Hound has not pled any  
10 facts suggesting that Expandable could have made the changes faster or cheaper than  
11 what was offered. While misrepresentations made by Expandable about the flexibility of  
12 its software and the software’s ability to support any pricing model “out of the box”  
13 could be sufficient to state claims of misrepresentation (though the Court is not ruling on  
14 that at this time), the contracts themselves do not require Expandable to alter its software  
15 to fit any pricing model. The Court will not read such a term into the contract. Thus,  
16 Signal Hound’s allegations are insufficient to state a claim for breach of the implied  
17 covenant of good faith and fair dealing.

18       Therefore, Expandable’s motion to dismiss is GRANTED as to Signal Hound’s  
19 claim for breach of the implied covenant of good faith and fair dealing, and that claim is  
20 DISMISSED.



**D. Breach of Implied Warranty of Fitness for Particular Purpose**

Signal Hound alleges that Expandable breached the implied warranty of fitness for a particular purpose because “Expandable had reason to know the particular use to which Signal Hound wished to put Expandable’s software” and it failed to provide suitable software. Dkt. 14, ¶¶ 43–50. Expandable argues that Signal Hound waived implied warranties in the SLA, including fitness for a particular purpose, and that the waiver was conspicuous. Dkt. 17 at 16. Signal Hound argues that the waiver was not conspicuous because the heading did not indicate waiver of warranties, no language in the provision is in larger or contrasting type, and the waiver is not set off from surrounding text of the same size to call attention to it. Dkt. 20 at 14. Expandable argues that the waiver is conspicuous because the provision is titled “**WARRANTY**” in bold and capital letters, and it is not buried in a long and complicated contract. Dkt. 21 at 10.

“[T]o exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.” Cal. Com. Code § 2316(2). A term is conspicuous if it is “so written, displayed, or presented that a reasonable person against whom it is to operate ought to have noticed it.” Cal. Com. Code § 1201(b)(10). Whether a term is conspicuous is a decision for the court. *Id.* “A heading in capitals equal to or greater in size than the surrounding text” is conspicuous. *Id.* at (b)(10)(A).

The warranty disclaimer is conspicuous. The disclaimer is on the first page of a two-page contract, and it includes the heading, “**WARRANTY**” in bold and capital letters Dkt. 14-2 at 4. The provision only contains three sentences after the title, the last of which states: “This warranty is in lieu of all other warranties expressed or implied,

1 including, but not limited to, the implied warranties of merchantability and fitness for a  
 2 particular purpose.” *Id.* The fact that the title says “warranty” and not “disclaimer of  
 3 warranty” or something similar does not change the analysis. The disclaimer is by no  
 4 means hidden or difficult to find, and it clearly disclaims the implied warranty of fitness  
 5 for a particular purpose.

6 Therefore, Expandable’s motion to dismiss is GRANTED as to Signal Hound’s  
 7 claim for breach of the implied warranty of fitness for a particular purpose, and that claim  
 8 is DISMISSED.

#### 9 **E. Failure of Consideration**

10 Signal Hound argues that it is “entitled to rescission of the Software Maintenance  
 11 Agreement” and is “entitled to a refund of unused hours of professional service, at a rate  
 12 of \$175 per hour” because Signal Hound was never able to implement and use  
 13 Expandable’s software. Dkt. 14, ¶¶ 56–57.<sup>1</sup> Expandable argues that Signal Hound itself  
 14 chose not to use the software and that Expandable never contracted to refund the contract  
 15 price if Signal Hound chose not to use the services in the agreement. Dkt. 17 at 17. Signal  
 16 Hound responds that because it received nothing of value under the contract, the contract  
 17 should be rescinded, and it should receive restitution. Dkt. 20 at 17.

18 Under California law, “[a] party to a contract may rescind the contract . . . if the  
 19 consideration for the obligation of the rescinding party, before it is rendered to him, fails  
 20 in a material respect from any cause.” Cal. Civ. Code § 1689(b)(4). “[A] failure of

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 22 <sup>1</sup> Paragraph 57 in Signal Hound’s Amended Complaint, Dkt. 14, is mislabeled as paragraph 55.

1 consideration must be material, or go to the essence of the contract before rescission is  
2 appropriate.” *Wylar v. Feuer*, 85 Cal. App. 3d 392, 403–04 (1978) (internal quotations  
3 omitted).

4 While it is true that the SMA does not expressly state that Expandable would  
5 refund the purchase price of the contract if Signal Hound decided not to use its software,  
6 the “essence” of the contract is based on the idea that Signal Hound would have usable  
7 software for Expandable to maintain. If Expandable had provided Signal Hound software  
8 that did not work at all, for any purpose, certainly rescission of the SMA would be  
9 proper. Indeed, Expandable can still argue that there has not been a failure of  
10 consideration, but Signal Hound has pled sufficient facts to state a plausible claim and  
11 survive a motion to dismiss.

12 Therefore, Expandable’s motion to dismiss is DENIED as to Signal Hound’s  
13 failure of consideration claim.

14 **F. Leave to Amend**

15 On a Rule 12(b)(6) motion, “a district court should grant leave to amend even if no  
16 request to amend the pleading was made, unless it determines that the pleading could not  
17 possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal.*  
18 *Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (internal citations omitted). In  
19 the event the court finds that dismissal is warranted, the court should grant the plaintiff  
20 leave to amend unless amendment would be futile. *Eminence Capital, LLC v. Aspeon,*  
21 *Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). “[A] proposed amendment is futile only if no  
22 set of facts can be proved under the amendment to the pleadings that would constitute a

valid and sufficient claim or defense.” *Miller v. Rukoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (internal citations omitted).

There are no set of facts that can be proved that would constitute a valid claim for breach of the implied warranty for fitness for a particular purpose because Signal Hound clearly waived its right to assert such a claim in the contract. Thus, amendment of that claim would be futile, the Court will not grant leave to amend it, and the claim is dismissed with prejudice. The same is not true for Signal Hound’s breach of the covenant of good faith and fair dealing claim. Thus, the Court will grant Signal Hound leave to amend that claim. Any amendment should come after the Court has ruled on the misrepresentation claims for the sake of efficiency.

### III. ORDER

Therefore, it is hereby **ORDERED** that Defendant Expendable Software, Inc.’s Motion to Dismiss, Dkt. 17, is **GRANTED** as to Signal Hound’s implied covenant of good faith and fair dealing and implied warranty of fitness for a particular purpose claims and **DENIED** as to Signal Hound’s failure of consideration claim. The Court **RESERVES RULING** on Signal Hound’s claims for intentional and negligent misrepresentation.

Expandable shall file supplemental briefing addressing the choice of law issue and the application of Washington law to the misrepresentation claims no later than April 8, 2022. Signal Hound may respond no later than April 15, 2022. Neither brief shall exceed ten (10) pages in length. Following the Court’s order on the misrepresentation claims,

1 Signal Hound shall be permitted to amend its good faith and fair dealing claim. The Clerk  
2 shall renote Expendable's Motion to Dismiss, Dkt. 17, for consideration on the Court's  
3 April 15, 2022 calendar.

4 Dated this 25th day of March, 2022.

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7 BENJAMIN H. SETTLE  
United States District Judge  
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